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NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHARLES FREDRIC SMITH, Defendant and Appellant.	E028844 (Super.Ct.No. RIF87710) O P I N I O N

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry J.T. Carlton, Supervising Deputy Attorney General, and Gary W. Brozio, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Charles Frederic Smith appeals after he was convicted of one count of robbery, with a true finding that a principal was armed with a firearm in the commission of the offense. He contends his conviction should be reversed primarily because of destruction of evidence. Defendant failed to show that the destroyed evidence was exculpatory. We affirm.

FACTS AND PROCEDURAL HISTORY

On August 31, 1999, Carolyn Krawiec was seated in a doughnut shop in part of a shopping center in Riverside, California. As she munched her doughnut that afternoon, Krawiec noticed a compact car backing into a parking space directly in front of the doughnut shop. It was highly unusual for anyone to back into the parking spaces immediately facing the shops. Three Black men got out of the car and walked toward the shopping center's supermarket. One of the three Black men was larger than the other two. The largest man had his hair braided.

Approximately 10 minutes later, Krawiec again saw the 3 men. This time they were running. They ran back to their car, jumped in, and sped away. Krawiec heard someone say that something had happened at the grocery store. She tried to memorize the license number of the car, but was unable to do so.

In the meantime, Mary Ebli was a manager on duty inside the supermarket. In the front of the store stood a service desk; one of the special transactions handled at the service desk was sending money by Western Union wire. Ebli was in the front of the store at the service desk, taking care of a Western Union transaction. Suddenly, someone pushed her and ordered her to leave the money drawer open. Ebli was surrounded by three Black men. One pressed a silver semi-automatic gun to her side. The men reached into the drawers and took what they wanted; they then ran out the door. The robbery took place in a matter of seconds. Ebli did not get a good look at the suspects, but all three men were African-Americans in their twenties. One of the men was bigger than the others; he wore his hair in braids. Police later showed Ebli photographic lineups. She was unable to identify anyone in the lineups.

Andrew Pinedo, a store clerk, was working at one of the cash registers when he heard someone say, "What's going on?" Pinedo turned and saw three Black men huddled around Ebli at the Western Union counter. The men were young, in their 20's, and they wore baggy clothes. One man's hair was braided. Another, the largest of the three, wore his hair in a large, poufed, "Afro" style. Pinedo saw Ebli either being shoved or falling, as two of the men reached into the drawers to grab money. In a matter of seconds, the three men grabbed the money and ran. Pinedo saw them disappear around the corner of the doughnut shop. Pinedo later selected defendant's picture from a photographic lineup, identifying him as one of the robbers. Pinedo also identified both defendant and codefendant Yerodin Prince at trial.

Lynn Marie Hummel was sitting outside the doughnut shop that day. She saw three men running pell mell from the direction of the supermarket. As they rounded the corner of the doughnut shop, they dropped some boxes containing currency and rolled coins. The three men rushed into a light blue car and drove away. Hummel noted part of the license plate of the car that drove away; Hummel's friend tried to memorize another part of the license number. Hummel wrote down the number -- 3UNJ897 -- and gave it to police. Hummel also recovered the dropped money and turned it in to a security guard.

Hummel could not confidently identify any of the three Black men she saw, but she did remember that one was taller and huskier than the other two. She was unable to identify anyone in photographic lineups the police showed to her.

Jeffrey Dan Lee was emptying the trash from his bagel shop at the shopping center on the afternoon of August 31, 1999. He saw a car, carrying four Black males, enter the parking lot. Lee thought that the four men in the car did not "fit" with the people he usually saw at the shopping center. He exchanged glances with one of the men in the car.

A few minutes later, as Lee was leaving the shopping center, he saw the same car, blocking traffic, backing into a parking space in front of another shop. Lee later identified defendant's picture from a photographic lineup as the man he saw in the car. He also identified defendant in court.

A shopping center security guard remembered seeing the get-away car a few days earlier. The supermarket assistant manager pulled the Western Union records and found that two days before the robbery, on August 29, 1999, defendant had wired money to his wife in Los Angeles.

On September 1, 1999, the day after the robbery, Riverside police officers stopped a blue Chevrolet owned by Keith Dean. The license number of the blue Chevrolet was 3UJN897. Inside the car, officers found numerous items of clothing, a receipt for a local motel, and the registration for another vehicle.

On September 2, 1999, police executed a search warrant at the apartment of Kathleen Sipp, a woman with whom defendant had stayed in Riverside. Inside the apartment, the officers recovered a duffel bag containing some items of clothing, a chrome semi-automatic handgun, and a traffic citation issued to codefendant Prince.

When police showed the chrome semi-automatic gun to Mary Ebli, Ebli said the gun looked like the one that the robbers had used. At trial, she could not be sure it was the same gun, but it looked similar to the gun the robbers held on her.

Police officers staked out the motel listed on the receipt found in the car. On September 3, 1999, police arrested defendant after he left the motel room. Police found codefendant Prince inside the room and arrested him also.

Defendant denied any involvement in the robbery, although he admitted he had wired money to his wife at the same supermarket two days before the robbery. Codefendant Prince initially denied any

involvement in the robbery also. He did admit that the duffel bag recovered from Sipp's apartment was his, but said he did not own a gun.

After the initial interviews, the investigating officers left defendant and Prince alone in the interview room. Detective Assumma secretly placed a tape recorder in a trash can inside the room, attempting to record the conversation between defendant and Prince. Detective Assumma later testified, however, that the recording was inaudible. Eventually, he taped over it.

After defendant and Prince had been left together in the interview room, Prince approached Detective Assumma and admitted he had been involved in the robbery. He told Detective Assumma that he had helped put money in a bag. He admitted that the gun in the duffel bag was his. He maintained, however, that defendant had not participated.

At trial, Prince told a different story of his involvement in the crime. He testified that he unwittingly drove three other men, none of whom was defendant, to the shopping center. He did not know until they arrived that they intended to commit a robbery. He stayed with the car and merely acted as the get-away driver; he never set foot inside the grocery store. He denied ever having told Detective Assumma that the gun was his. Prince explained that he lied in his police interview: he did not want to be tied to the get-away car, so he said instead that he had scooped the money from the drawer into a bag.

After defendant and Prince had been arrested, police interviewed Kathleen Sipp. Sipp told police that defendant, codefendant Prince, and at least three other men were at her apartment on the day of the robbery. Several of the men left the apartment that afternoon, but returned within about an hour. Defendant came back a few minutes before the others. When everyone had returned, Sipp saw Prince with a gun. Prince bragged how he had "pointed a gun at a lady and told her to put the money in

a bag." Prince teased another young man, called "Trigger," that he had not done the job right, so Prince had to take the gun from him. Trigger responded that he was not afraid, and said that no one would know they had done it because their backs were to the camera. Defendant was present during this discussion.

Defendant relied on a defense of mistaken identification and did not present any affirmative evidence in his own behalf.

The jury convicted defendant of robbery and found true the allegation that a principal was armed with a firearm.[1] Defendant admitted that he had suffered prior serious felony conviction under Penal Code section 667, subdivision (a), a prior prison term conviction,[2] and a prior conviction under the three strikes law.[3] The court sentenced defendant to 13 years in state prison. Defendant now appeals.

ANALYSIS

I. The Court Properly Denied the Defense Motion to Dismiss for Failure to Preserve the Tape Recording of Defendant's Station House Conversation with Codefendant Prince

Defendant's primary contention on appeal is that the failure to preserve the tape recording of defendant's conversation with codefendant Prince deprived him of a fair trial. He contends that the destroyed evidence was material to his defense "because it contained the conversation between [defendant] and Prince in which [defendant's] innocence was discussed."

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[1] Penal Code sections 211, 12022, subdivision (a).
[2] Penal Code section 667.5, subdivision (b).
[3] Penal Code section 667, subdivisions (b)-(i).

Defendant's reliance on *Brady*,[4] *Trombetta*,[5] and *Youngblood*[6] is misplaced. While the prosecution has a duty, within limits, to preserve and to produce evidence which is material to the defense, the missing evidence here was not shown to be material. Counsel simply assumes what has not been proven: i.e., that the destroyed evidence was in fact a recording which showed that defendant had denied culpability in the robbery. Defense counsel asserts that *if* defendant had remonstrated with Prince, protesting his innocence, *if* Prince had acknowledged defendant's lack of involvement, *if* defendant had exclaimed he was not involved, *if* he had demanded that Prince tell the truth, and *if* Prince had acknowledged that he would do so, then somehow defendant's denials would not have been merely self-serving and the result of the trial might have been different.

But the record does not support any of defense counsel's suppositions about the nature of the evidence excluded. So far as the record shows, the recording was *unintelligible*. Even if the conversation had accorded in every respect with defense counsel's speculations (for the argument rests on speculation and nothing more), the destroyed evidence -- the tape recording -- did not show it. As defendant himself acknowledges, the California Supreme Court has held that, to meet the standard of materiality, the evidence must have an exculpatory value which is apparent before the evidence is destroyed.[7] The inaudible tape recording had no such apparent exculpatory value. There is no reasonable possibility, let alone a probability, that defense possession of an unintelligible tape recording would have altered the trial result one whit. The hypothesis that the tape recording might have been

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[4] *Brady v. Maryland* (1963) 373 U.S. 83, 87 [83 S.Ct. 1194, 10 L.Ed.2d 215].
[5] *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413].
[6] *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281].

enhanced is pure conjecture, not evidence. As has been held, the duty of the state to preserve evidence is "further limited when the defendant's challenge is to 'the failure of the State to preserve evidentiary material of which no more can be said than that it *could* have been subjected to tests, the results of which *might* have exonerated the defendant.' (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 [109 S.Ct. 333, 337, 102 L.Ed.2d 281].)"[8]

The second prong of the materiality test under *Zapien*,[9] is that the defendant is unable to obtain comparable evidence by other reasonably available means. Prince did testify at trial about the conversation between himself and defendant while they were left alone in the interview room. He related that defendant complained about being wrongly accused. Defendant was "speaking and rambling on about what's going on, I didn't do this, and blah, blah." Prince began to get pangs of conscience, and went to Detective Assumma, to admit his own involvement in the robbery (though the story he then told was admittedly false), and to exculpate defendant.

Both defendant and Prince were parties to the conversation in the interview room. Prince actually testified at trial and could have been asked in detail about the conversation. Defendant's counsel never inquired. Defendant now objects that it would have been fruitless to elicit defendant's exact words, because they would have been inadmissible hearsay. Counsel has also urged, however, that the conversation was exculpatory *because* defendant's statements "may have been admissible as

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[footnote continued from previous page]

[7] *People v. Zapien* (1993) 4 Cal.4th 929, 964.
[8] *People v. Catlin* (2001) 26 Cal.4th 81, 160, italics added.
[9] *People v. Zapien*, *supra*, 4 Cal.4th 929, 964.

an excited utterance." If defendant made excited utterances, Prince also could have testified about them under an exception to the hearsay rule. On the other hand, if there were no excited utterances, defendant's statements would have been inadmissible hearsay, and thus unavailable as exculpatory evidence, whether recorded or not.

Finally, defendant has failed to show that Detective Assumma acted in bad faith in recording over the inaudible tape. "'[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'"[10]

Defendant's motion to dismiss the information because of the alleged destruction of exculpatory evidence was unmeritorious, and thus properly denied.

II. The Alleged Failure to Preserve Witness Names Does Not Warrant Reversal

During the initial phase of the investigation, Riverside police detectives compiled a six-picture photographic lineup containing defendant's photograph. Detective Assumma showed this photographic array to some of the witnesses, including Pinedo, the supermarket cashier, and Lee, the bagel store owner. Both Pinedo and Lee selected defendant's picture from this initial lineup.

After defendant was arrested on September 3, 1999, police officers composed a new photographic lineup, using the front and side views from defendant's booking photographs. Detective Assumma testified that he did not show the second lineup to either Pinedo or Lee, who had each already identified defendant in the first lineup. "And the reason I didn't, because he's -- he already

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[10] *People v. Roybal* (1998) 19 Cal.4th 481, 509-510, quoting *Arizona v. Youngblood*, *supra*, 488 U.S. 51, 58 [109 S.Ct. 333, 337, 102 L.Ed.2d 281].

viewed one photo lineup and already picked [defendant] out. It would have been fruitless to show him another photo lineup with the same individual. He would have picked the same individual out."

Detective Assumma indicated that "[w]e showed lineups to probably eight witnesses or so." No one who was shown the second lineup card identified defendant. The officers failed to document, however, the identities of the witnesses who were shown the second photographic lineup, or to write reports concerning the results of the interviews with these witnesses.

Defendant now argues that the officers' failure to record the identities of the witnesses who were shown the second lineup "foreclosed [his] ability to present evidence which exculpated him from the incident in question and, therefore, prevented him from presenting a complete defense." He speculates that *if* the names of the witnesses had been recorded, the defense *might* have been able to call them as witnesses, and that *if* any of the witnesses had stated that defendant was not the person who committed the robbery, then "he would have likely been acquitted." Speculation is not evidence, however.

No one specifically asked Detective Assumma to name the persons to whom he had shown the second lineup. Carolyn Krawiec had testified, however, that she was shown a lineup card and was unable to identify anyone. She also did not recognize anyone in the courtroom at trial, and was unable to identify the car. Lynn Hummel was unable to identify the photograph of the car at trial. She testified that the police showed her some photos, but she told them that she did not feel confident she could identify anyone. She saw no one in the photographic lineup that she was certain was involved. She could not identify defendant or codefendant Prince in court.

On this record, we are unable to say whether or not the persons to whom the officers showed the second lineup can be identified. We have some hints that perhaps their identities can be ascertained.

Perhaps Krawiec and Hummel were shown the second lineup card. Hummel's friend, who helped her record the car's license plate number, was not called as a witness, but she apparently was interviewed by police, and perhaps also shown a lineup card. The supermarket assistant manager, who handled defendant's Western Union transaction two days before the robbery, may have been shown the second lineup card. Ebli herself may have been shown the second lineup card. No one has yet made the necessary inquiries, however, to rule out these possibilities, or to establish what any witnesses might have said when shown the second lineup. So far, there is no proof or indication that any supposed exculpatory evidence exists or could be developed.

Article VI, section 13, of the California Constitution provides that a judgment cannot be set aside ". . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The defendant bears the burden of demonstrating such error. Defendant has failed to meet that burden here.

Insofar as there is any evidence concerning the second photographic lineup, the failure of some witnesses to identify defendant was simply identical to or cumulative of some of the trial evidence, in which witnesses failed to identify defendant either in a photographic lineup or in court. Strictly speaking, however, there is no evidence to indicate who was shown the second photographic lineup or what the results of any lineup viewing were. The results, if any, were not necessarily exculpatory in the sense that defendant postulates: i.e., a definitive statement that defendant was not one of the robbers. The existence of any such statement is strictly hypothetical. Nor is it proven that the identities of any such witnesses are in fact unavailable or unable to be ascertained by independent inquiry.

Defendant has failed on this record to demonstrate positive error. His remedy, if he wishes to pursue this claim, lies in a habeas corpus proceeding, upon which the appropriate outside-the-record factual inquiries can be made.[11]

III. The Claim of Ineffective Assistance of Counsel Fails

Defendant next urges, piggy-backing his earlier claims, that his counsel was incompetent for failing to move for dismissal or for a mistrial as a result of the losses of supposedly "exculpatory" evidence. This contention is without merit.

To establish constitutionally ineffective assistance of counsel under either the state or federal constitutional right to counsel, the defendant must demonstrate both that (1) the attorney's performance fell below an objective level of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) the defendant suffered prejudice as a result of counsel's failures.[12] Prejudice is established if there is a reasonable probability that, absent counsel's errors, the result would have been different.[13]

In addition, however, when the reason for counsel's action or inaction is apparent on the record, the court will determine whether that reason reflects reasonably competent performance by an attorney acting as a conscientious and diligent advocate. If no explanation appears, an ineffective counsel claim

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[11] *People v. Sanchez* (1995) 12 Cal.4th 1, 59.

[12] *People v. Coddington* (2000) 23 Cal.4th 529, 651-652.

[13] *Lockhart v. Fretwell* (1993) 506 U.S. 364, 371 [113 S.Ct. 838, 843-844, 122 L.Ed.2d 180]; *Strickland* v. *Washington* (1984) 466 U.S. 668, 687-688 [104 S.Ct. 2052, 2064-2065, 80 L.Ed.2d 674].

will be rejected unless the attorney was asked for and did not offer an explanation, or there can be no satisfactory explanation.[14] Otherwise, the defendant is left to his remedy on habeas corpus where evidence outside the record may shed light on the reason for the attorney's action. The burden is on a defendant who challenges the competence of his or her trial counsel to overcome the presumption that counsel's conduct is within the range of reasonably professional assistance.[15]

The record here shows that counsel did move to dismiss the information based on the destruction of the interview tape. That motion was unsuccessful. While the record does not further affirmatively show why counsel did not renew the motion based upon the failure to identify the witnesses who were shown the second lineup card, this is not a case in which there could be no satisfactory explanation. Indeed, not only could counsel reasonably have made a tactical decision to forgo such a motion, which had even less chance of success than the earlier motion to dismiss, counsel took other affirmative steps to remedy the situation.

Counsel had requested a special instruction on the alleged destruction of evidence,[16] and ultimately secured a modified jury instruction, informing the jurors that they could take into account a witness's "attitude . . . toward the preservation of potential evidence" in assessing his or her credibility.

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[14] *People v. Osband* (1996) 13 Cal.4th 622, 700-701.

[15] *Strickland* v. *Washington*, *supra*, 466 U.S. 668, 689 [104 S.Ct. 2052, 2065, 80 L.Ed.2d 674].

[16] The requested instruction stated: "If you find that Detective Assumma secretly tape recorded a conversation between defendants Prince and Smith without preserving the tape, then you may disbelieve the reason given by Detective Assumma for erasing the tape and consider his destruction of that recorded conversation for the purposes [*sic*] of determining Detective Assumma's credibility."

This instruction could have had no aim other than to highlight and call into question Detective Assumma's conduct, such as taping over the interview room recording.

The court properly rejected counsel's proposed special instruction as argumentative. An instruction which "'invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence,' . . . is considered 'argumentative' and therefore should not be given."[17]

Defendant's further argument that the instruction was inadequate, because "[i]t was not really a question of whether Assumma was believable since he was not an eyewitness," is simply incorrect. As to the matter at issue -- what was on the destroyed tape -- he was the only percipient witness. The believability of his representation that the tape was unintelligible was the only question of concern. The modification of the credibility instruction was an adequate response to the circumstances.

Defendant can show neither that his counsel performed below the standard of a reasonably competent attorney, nor prejudice. His claim of ineffective assistance of counsel must therefore be rejected.

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[17] *People v. Earp* (1999) 20 Cal.4th 826, 886.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

/s/ Ward
J.

We concur:

/s/ Ramirez
P.J.

/s/ Hollenhorst
J.